PUBLIC SERVICE COMPANY RATES AND THE FOURTEENTH AMENDMENT. II.

III.

IF the enforcement of any state law or administrative order establishing a schedule of rates or prices will violate the constitutional rights of any person or corporation secured by the Fourteenth Amendment, then the only effective and probably the only permissible remedy is by bill in equity against the board or commission that made the order and against the state officials charged with its enforcement.

The elementary and underlying ground of equity jurisdiction from which the special jurisdiction in this class of cases has been developed is the absence of any plain, adequate, and complete remedy at law for the invasion of a clear legal right.[1]

It is clear that no remedy afforded by the common law can be "complete, practical, or efficient" in the class of cases with which we are dealing.

It has been customary in some of the Western states to give in the statute establishing or authorizing the establishment of railroad rates actions at law to shippers for damages and penalties against railroads in respect of each refusal to accept or to transport goods at the statutory rate. Thus the transactions of a single day may give rise to a thousand suits. And the same result would follow even in the absence of such special statutory grants of actions. Again, it is common knowledge that the only practical way for a gas, water, transportation, or similar company to collect its bills is

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[1] Bispham, Equity, 6th ed., 26, 533, 553; Boyce's Ex. *v.* Grundy, 3 Pet. 210; Watson *v.* Sutherland, 5 Wall. 74; Allen *v.* B. & O. R. R., 114 U. S. 311, 316; Kilbourn *v.* Sunderland, 130 U. S. 505, 514, 515; Gormley *v.* Clark, 134 U. S. 338, 339. The fact that the complainant in equity may have a legal action to redress the wrong, or a legal defence to the respondent's threatened action, is not of itself sufficient to render the complainant's legal remedy, whether by action or defence, either adequate or complete. Boyce's Ex. *v.* Grundy, 3 Pet. 210; Insurance Co. *v.* Bailey, 13 Wall. 616, 621; St. Louis, etc., *v.* Indianapolis, etc., Ry., 9 Bliss 99; Gormley *v.* Clark, 134 U. S. 338, 349; Kilbourn *v.* Sunderland, 130 U. S. 505, 514; Tyler *v.* Savage, 143 U. S. 79, 95; Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1. As stated by the court in the Walla Walla case, 172 U. S. at p. 12, in order to defeat the jurisdiction of a court in equity, the remedy at law must be as "complete, practical, and efficient as the remedy in equity."

to see that they are paid either in cash at the time the service is rendered (as in the case of transportation and telegraph companies) or from month to month (as in the case of gas and water companies). To let them run on, pending litigation, would be to lose a large part of them altogether. The prompt collection of current bills is an essential condition of the successful prosecution of such a business as that of furnishing gas, water, and similar commodities. After the consumer has moved, collection is, in many cases, impossible; and to postpone the payment of hundreds or thousands of such bills until the termination of the several law suits respecting them would thus necessarily result in certain loss to the company, even if the final decision should be favorable to it. And, besides the multiplicity of suits which would arise, and the consequent irreparable damage to the complainant through impossibility of collection, there is no certainty that the result of a jury trial would be the same in all the cases. The company might be successful in some and lose in others. To resort to the expedient of shutting off the supply (as in the case of gas or electricity) if the consumers refuse to pay the company's price, would not improve the situation; for the result would be an equal number of law suits in which the company would be defendant instead of plaintiff, and a heavy loss in consumption.[1] Thus in every such case the legal remedy appears to produce a multiplicity of suits, or irreparable damage, and generally both.[2]

It is, however, when we consider the nature of the only way in which the invalidity of a schedule of rates can be made to appear that the inadequacy and impracticability of all legal remedies become most striking. There can rarely if ever be anything in the language or on the face of a statute or administrative order establishing a schedule of rates from which it can be seen that the rates are unreasonably low or that anybody's constitutional rights will be violated by its enforcement. It is only in the application of the schedule to particular cases and from facts outside the law and

[1] It hardly needs to be said that the avoidance of a multiplicity of suits is a valid reason for resorting to a court of equity, in which the issue can be litigated and disposed of once for all. 1 Foster's Federal Practice, sect. 209; Union Pacific R. R. *v.* Cheyenne, 113 U. S. 516; Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429; Cruikshank *v.* Bidwell, 176 U. S. 73; Ogden City *v.* Armstrong, 168 U. S. 224; Smyth *v.* Ames, 169 U. S. 466; Sanford *v.* Poe, 16 C. C. A. 305; Taylor *v.* Louisville & N. R. R., 31 C. C. A. 537.

[2] For a case to restrain the collection of an alleged unconstitutional tax, where there was federal jurisdiction but no equity jurisdiction because the remedy at law was adequate, see Shelton *v.* Platt, 139 U. S. 591.

outside the schedule that the violation of the Fourteenth Amendment can be made to appear. And those facts are of a kind to be established mainly by the testimony of experts and the most careful, complicated, and elaborate investigation of a mass of data generally technical and difficult to understand. The ends of justice and of public policy would not be served by permitting evidence of this character to be submitted to juries in one suit or many suits. Moreover, the state officials charged with the direct enforcement against the company of the statute or order would not respect and could not be expected to regard such judgments as morally or legally binding upon them in cases to which they were not parties and could not offer the evidence favorable to the constitutional validity of the statute or order.

It is such considerations as these that have led to several intimations by the courts that statutes and administrative orders establishing rates are *prima facie* valid and cannot be attacked in proceedings to which the officials who made them and those charged with their enforcement are not parties. If this is true, then there is no longer any question of the inadequacy or incompleteness of the legal remedy, for there is no legal remedy at all [1] as between the company and its customers.

For these several reasons — either because a bill in equity is the only remedy open to the complainant, or because to confine the complainant to its remedy at law would be to work irreparable damage to it, or would lead to a multiplicity of suits — it is well settled that a public service corporation can resort to a court of equity to test the validity under the Fourteenth Amendment of an act or order of a state legislature or its agents fixing the price of the commodities in which it deals or the charge for the service it renders, and that upon motion supported by satisfactory affidavits (accompanied, generally, by a bond) the enforcement of the order will be enjoined *pendente lite.*

I. The Supreme Court Cases.

Of the six cases in the United States Supreme Court in which a state rate has been declared invalid, three [2] were proceedings, either by bill in equity, or by petition for a writ of mandamus by

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[1] Chicago, etc., R. R. Co. *v.* Minnesota, 134 U. S. 418, 460; Covington Turnpike Co. *v.* Sanford, 164 U. S. 578; Lake Shore, etc., R. R. Co. *v.* Smith, 173 U. S. 684; Haverhill Gas Light Co. *v.* Barker *et al.*, 109 Fed. Rep. 694.

[2] Chicago, M. & St. Paul R. R. *v.* Minnesota, 134 U. S. 418; Covington Turnpike Co. *v.* Sanford, 164 U. S. 578; Lake Shore & M. S. R. R. *v.* Smith, 173 U. S. 684.

state officers against the company. The remaining three cases[1] were bills in equity by the company or the holders of its securities against the state officers charged with the making or enforcement of the act.

In the case in Chicago, M. & St. P. R. R. *v.* Minnesota,[2] Mr. Justice Miller says that, until the judiciary has been asked to declare the regulations void, the tariff so fixed is the law, and must be submitted to both by the carrier and the party with whom he deals, and adds: —

"The proper and only mode of relief is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States. . . .

"Until this is done, it is not competent for each individual having dealings with the company, or the company itself, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

He says that a petition for a writ of mandamus against the company is an equally appropriate mode of trial; but this remedy can of course only be sought by the state.

So in St. Louis & S. F. R. R. *v.* Gill,[3] Mr. Justice Shiras, speaking for the court, inclines to the view that the justice of a state rate, made by commissioners, can be inquired into only in cases in which the state is represented by the commissioners or the attorney-general, and not in collateral proceedings.

"In such cases the course recommended by Mr. Justice Miller may well be followed: that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding, wherein the rights of the public as well as those of the company complaining can be protected."

In Smyth *v.* Ames,[4] Mr. Justice Harlan, speaking for the court, says: —

"The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transporta-

[1] Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362; Smyth *v.* Ames, 169 U. S. 466; Chicago, M. & St. P. R. R. *v.* Tomkins, 167 U. S. 176.

[2] 134 U. S. 418, 460. [3] 156 U. S. 649, 666. [4] 169 U. S. 466, at pp. 517, 518.

tion. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all, and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained."

In every case in which a state rate has been declared void, the state has been represented either as itself petitioner, or, where the proceedings have been brought in behalf of the company, through the joinder as parties respondent of the commissioners, attorney-general, or other state officers specially charged with the making or enforcement of the rate.

2. Cases in the Lower Federal Courts.

The decisions of the lower federal courts are to the same effect.

Chicago & N. W. R. R. *v.* Dey [1] was a bill in equity brought by a railroad company against state railroad commissioners to restrain them from enforcing, by suits for penalties or otherwise, their schedule of maximum freight rates. In granting the motion for a temporary injunction, Brewer, J., said: —

"Equity interferes to prevent a multiplicity of suits; and, where one act may be the foundation of many suits, the courts have a right, and it is their duty in the first instance, to stay that act as unlawful."

In Interstate Com. Com. *v.* Cincin., etc., R. R.,[2] which was a bill by the commission to enforce their order, Sage, J., in denying a motion for a preliminary restraining order against the company, says: —

"If the defendants are restrained from charging or collecting freight in excess of the rates fixed by the commission, they will be practically without remedy if at last the order of the commission should be held to be unlawful." [3]

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[1] 35 Fed. Rep. 866, 882. This case, decided in 1888, was, as already noted, the first in which a federal court set aside a state rate as unreasonably low; but the same principle of equity jurisdiction had been previously applied to a state rate passed in violation of the interstate commerce clause in Louisville & N. R. R. *v.* Com'rs, 19 Fed. Rep. 679.

[2] 64 Fed. Rep. 981.

[3] See also Shinkle *v.* R. R., 62 Fed. Rep. 690, an Interstate Commerce Commission case to the same effect.

Cleveland G. L. & Coke Co. *v.* Cleveland[1] was a bill in equity to enjoin the enforcement of an ordinance fixing the price of gas in violation of the Fourteenth Amendment. A demurrer on the ground, *inter alia*, of lack of jurisdiction in equity, was overruled, Jackson, J., saying that the court "entertains no doubt about its jurisdiction to award the relief asked."

Capital City Gas Light Co. *v.* Des Moines[2] was a bill to have declared void a city ordinance fixing the price of gas, and to enjoin the enforcement thereof. A demurrer on the ground, *inter alia*, of lack of jurisdiction in equity was overruled, Woolson, J., treating the question of jurisdiction in equity as no longer open, and quoting the remarks of Miller, J., in the Minnesota case cited *supra*.

New Memphis Gas, etc., Co. *v.* Memphis[3] was a bill to enjoin the enforcement of an ordinance fixing the price of gas. A motion for a restraining order was granted, Clark, J., saying that the public could be protected by a bond against the event that the bill should finally be dismissed,

> "while to refuse the injunction would possibly result in a destruction of the plaintiff's business and property before this litigation can be terminated."

In this connection it may be said that the suggestion which has been made of incorporating in the rate statute a provision that the schedule established should be kept in force until the termination of any litigation brought to test its constitutionality is unsound. The public can hardly be compelled to give security, and without security the company would suffer irreparable damage and practically be deprived of its property without due process of law if the schedule should turn out to be in violation of the Fourteenth Amendment.

In Southern Pacific R. R. *v.* Com.,[4] Judge McKenna continued a temporary restraining order pending the final decision of the court on a bill to enjoin the enforcement of a state freight rate.

Indianapolis Gas Co. *v.* Indianapolis[5] was a bill to enjoin the enforcement of a city ordinance fixing the price of gas. A motion for a restraining order was allowed, Baker, J., saying: —

> "It is evident if the restraining order is refused and the ordinance should eventually be held invalid, the injury resulting to the complainant would be practically irremediable because of the number of its patrons and the small amount to be received from each. On the other hand,

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[1] 71 Fed. Rep. 610, 615. [2] 72 Fed. Rep. 818; s. c., Ib. 829. [3] 72 Fed. Rep. 952.
[4] 78 Fed. Rep. 236. [5] 82 Fed. Rep. 245, 246.

the rights of the city can be fully protected by requiring the complainant to give a bond."

Cotting *v.* Kansas City Stock Yards Co.[1] was a bill to enjoin the enforcement of a statute of Kansas fixing charges for the various services of stock yards. At the final hearing on the merits before Thayer, Circuit Judge, and Foster, District Judge, the jurisdiction in equity was sustained, but the bill was dismissed on its merits, the injunction, however, to continue ten days, and thereafter if an appeal should be taken.

San Diego Land, etc., Co. *v.* Jasper[2] was a bill to enjoin the enforcement of water rates fixed by a board of county supervisors. A demurrer on the ground, *inter alia*, of lack of jurisdiction was overruled. Ross, J., referring to the allegations of the bill, which set out the danger of irreparable damage and a multiplicity of suits, and the lack of any adequate remedy at law, says : —

"These averments are admitted by the demurrer. They may not be true in fact, but for present purposes are to be accepted as true. So taking them, it cannot be doubted, I think, that the bill makes a good case." [3]

3. Cases in the State Courts.

As practically all litigation of this character is now carried on in the United States courts,[4] there are few decisions of the state courts upon the question here under discussion. Wherever the question has been raised, however, it has been settled in the state,

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[1] 82 Fed. Rep. 850.

[2] 89 Fed. Rep. 274, 281.

[3] See also to the same effect: Wilmington & W. R. Co. *v.* Com., 90 Fed. Rep. 33; San Joaquin Irr. Co. *v.* Stanislaus County, 90 Fed. Rep. 516; Northern Pacific R. R. *v.* Keyes, 91 Fed. Rep. 47; Cleveland City Ry. Co. *v.* Cleveland, 94 Fed. Rep. 385; Western Union Telegraph Co. *v.* Myatt, 98 Fed. Rep. 335; Los Angelos Water Co. *v.* Los Angelos, 103 Fed. Rep. 711, 739.

[4] It is, of course, perfectly clear that the circuit courts of the United States, as federal courts, under the act of Congress of March 3, 1875, as amended by the act of March 3, 1887, and of Aug. 13, 1888, have original jurisdiction of suits in equity of this nature, concurrent with the state courts, "where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2000," because these are strictly "suits . . . arising under the Constitution . . . of the United States." Diversity of citizenship is not necessary to give jurisdiction to the circuit court in such cases. In the language of Mr. Chief Justice Waite, in 96 U. S. 199, 203, the controversy is one "as to the operation and effect of the Constitution . . . upon the facts involved." See also 169 U. S. 466, 516; 134 U. S. 418, 459; 156 U. S. 649, 657; 172 U. S. 1; 104 Fed. Rep. 258; 103 Fed. Rep. 23, 216. And the test of the existence of the jurisdictional amount is in such cases the value of the right to be protected and the pecuniary amount of the injury to be prevented. 165 U. S. 107, 114, 115; 82 Fed. Rep. 65; 54 Fed. Rep. 547; 56 Fed. Rep. 352.

as well as in the federal courts, that the proper if not the only remedy for a corporation, claiming to be deprived of its property without due process of law through the operation of a state rate, is a bill in equity or some equivalent process praying for an injunction against the enforcement of the rate.[1]

There is, we believe, no judicial dissent from this proposition.

IV.

Under what circumstances must a suit in equity of the kind under consideration, in a circuit court of the United States, be deemed a suit against the state under authority of which the rates objected to were imposed, within the meaning of the Eleventh Amendment to the United States Constitution, which declares that "the judicial powers of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state."

It is, of course, true that, in determining the question whether a suit is against a state within the meaning of this Amendment, reliance can no longer be placed upon the simple test laid down in Osborn *v.* Bank[2] and Davis *v.* Gray,[3] namely, whether the state is by name or appropriate designation made a party defendant on the face of the record.[4] It is likewise true that no reliance can be placed upon the point that the Eleventh Amendment does not in terms forbid suits against a state by citizens of the same state, but only suits by citizens of other states.[5]

It is, however, important to emphasize the point that the conflict of authority upon the question to what extent the state must have a proprietary or corporate (as distinguished from a purely governmental) interest in the suit in order to render the state a necessary party according to the principles of equity jurisdiction — and

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[1] Spring Valley W. W. *v.* San Francisco, 82 Cal. 286; San Diego Water Co. *v.* San Diego, 118 Cal. 556.

[2] 9 Wheat. 738.

[3] 16 Wall. 203.

[4] But, as stated by Lamar, J., speaking for the Court in Pennoyer *v.* McConnaughy, 140 U. S. 1, 12, the general doctrine laid down in the two cases of Osborn *v.* Bank and Davis *v.* Gray, affirming the jurisdiction of the circuit courts of the United States to restrain state officers from executing unconstitutional statutes of the state in a case falling within some recognized head of equity jurisdiction, has never been departed from, and is still fully recognized by the Supreme Court.

[5] Hans *v.* Louisiana, 134 U. S. 1.

therefore to make it impossible under the principles of equity jurisdiction for the circuit courts to entertain the suit if the state is not made a party, and equally impossible, under the Eleventh Amendment, to entertain the suit if the state is made a party — has really nothing to do with the question now under consideration; for it seems to have been settled that the interest of the state in the enforcement of a schedule of rates imposed by its authority must be regarded as governmental and not as proprietary or corporate.

It is unnecessary to do more than to refer to the authorities in which this conflict, or apparent conflict, of judicial opinion, is presented. The cases may be classified as follows: —

A. Cases involving a corporate or proprietary interest on the part of the state.

(*a*) The jurisdiction of the federal courts has been *denied:* —

(1) Where the relief sought was some particular disposition of some acknowledged property of the state, as in Cunningham *v.* Macon, etc., R. R. Co.[1] and Christian *v.* Atlantic, etc., R. R. Co.[2]

(2) Where the relief sought was the affirmative and specific performance of some contract of the state, as in Louisiana *v.* Jumel,[3] Hapgood *v.* Southern,[4] North Carolina *v.* Temple,[5] and New York Guaranty Co. *v.* Steele.[6]

(3) Where the relief sought was the enjoining of acts by individual officers of the state, which, if performed, would amount to a breach of some contract of the state, but would not otherwise constitute personal wrong-doing upon the part of the individual defendants, — at least of such a kind as to give equity jurisdiction over such individual defendants alone, as in *In re* Ayres.[7]

(*b*) The jurisdiction of the federal courts has been *sustained:* —

(1) Where the complainant seeks to enjoin by bill in equity the violation, or to compel by mandamus the performance of a merely ministerial duty, as in Board of Liquidation *v.* McComb,[8] Sands *v.* Edmunds,[9] Rolston *v.* Missouri Fund Commissioners.[10]

(2) Where the acts threatened were not a violation of ministerial duties, but were injurious by way of placing a cloud on the title to land, as in Davis *v.* Gray,[11] Pennoyer *v.* McConnaughy.[12]

It will be noted that in none of the foregoing cases where the jurisdiction has been sustained were the acts enjoined trespasses, torts, or other physical invasions of the complainant's property.

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[1] 109 U. S. 446. [2] 133 U. S. 233. [3] 107 U. S. 711. [4] 117 U. S. 52.
[5] 134 U. S. 22. [6] Ib. 230. [7] 123 U. S. 443. [8] 92 U. S. 531.
[9] 116 U. S. 585. [10] 120 U. S. 390. [11] 16 Wall. 203. [12] 140 U. S. 1.

B. Cases involving no corporate or proprietary interest on the part of the state.

Suits in which the state has no proprietary interest, brought against state officers threatening to violate, under a state law or administrative order of which they were charged with the enforcement, rights secured to the complainant by the Constitution or laws of the United States, have never been held to be suits against the state within the meaning of the Eleventh Amendment.

The cases may be divided into two classes: —

(*a*) Where the acts sought to be enjoined would, if performed, amount to physical invasions of the plaintiff's property; that is to say, to common law trespasses or other torts of such a character as to call on settled principles of equity jurisdiction for the interposition of a court of equity, as, for instance, to prevent irreparable damage,[1] and the same principle applies in actions at law.[2]

Osborn *v.* Bank was a bill in equity against a state board, the state treasurer, and a tax collector to enjoin them from seizing in payment of taxes, in obedience to a mandatory statute of the state of Ohio, certain property of the complainant, and requiring them to restore to the complainant certain property already seized for the same purpose, but not yet turned over by them to the state. The equity of the bill was stated to be the danger of irreparable damage and the absence of any adequate remedy at law. A federal question was raised by the complainant's contention that the state statute in obedience to which the respondents were acting was in conflict with the federal statute incorporating the United States Bank, and with Art. I. sect. 8 of the Constitution of the United States, in pursuance of which said federal statute had been enacted. The respondents objected that the suit was against the state of Ohio within the meaning of the Eleventh Amendment. Marshall, C. J., speaking for the court and considering this contention of the respondents, said: [3] —

"It being admitted, then, that the agent is not protected by his connection with his principal, that he is responsible for his own act to the full extent of the injury, why should not the preventive power of the court

[1] Osborn *v.* Bank of United States, 9 Wheat. 738; Tomlinson *v.* Branch, 15 Wall. 460; Allen *v.* Baltimore & Ohio R. R. Co., 114 U. S. 311; Shelton *v.* Platt, 139 U. S. 591; Stanley v. Schwalby, 147 U. S. 508; *In re* Tyler, 149 U. S. 164; Belknap *v.* Schild, 161 U. S. 10.

[2] United States *v.* Lee, 106 U. S. 196; Poindexter *v.* Greenhow, 114 U. S. 270; Scott *v.* Donald, 165 U. S. 58; Tindall *v.* Wesley, 167 U. S. 204.

[3] At p. 842.

also be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for doing?"

In Allen *v.* Baltimore and Ohio R. R. Co., Mr. Justice Matthews, speaking for the court, said :[1] —

"The circumstances of this case bring it, so far as that remedy is in question [by injunction], fully within the principle established by this court by the decision of Osborn *v.* U. S. Bank, 9 Wheat. 739, and within the terms of the rule as declared in Cummings *v.* National Bank, 101 U. S. 503."

In *In re* Ayers, Mr. Justice Matthews, speaking for the court, says :[2] —

"In pursuance of the principles adjudged in the case of Osborn *v.* Bank, it has been repeatedly and uniformly held by this court that an injunction will lie to restrain the collection of taxes sought to be collected by seizures of property for taxes imposed in the name of the state, but contrary to the Constitution of the United States, the defendants being officers of the state threatening the distraint complained of. . . . The vital principle in all such cases is that the defendants, though professing to act as officers of the state, are threatening a violation of the personal or property rights of the complainant for which they are personally and individually liable."

(*b*) The second class of cases involving no proprietary interest on the part of the state in which the jurisdiction of the federal courts has been assumed or upheld, so far as the Eleventh Amendment goes, consists of cases, like those now under consideration, where the acts sought to be enjoined are simply the institution of litigation by state officers in the state courts.[3]

All of the cases referred to in the footnote were rate cases. All of them were bills in equity. In all of them the respondents were officers of states threatening to enforce solely by litigation in the state courts either state statutes or orders of state boards made

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[1] At p. 314. [2] 123 U. S. 443, at p. 500.

[3] Chicago, B. & Q. R. R. *v.* Iowa, 94 U. S. 155; Peik *v.* Chicago & N. W. R. R., 94 U. S. 164; Stone *v.* Farmers' Loan & Trust Co., 116 U. S. 307; Stone *v.* Illinois Central R. R. Co., 116 U. S. 347; Stone *v.* New Orleans, etc., R. R., 116 U. S. 352; Georgia R. R. & Banking Co. *v.* Smith, 128 U. S. 174; San Diego *v.* National City, 174 U. S. 739; Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362; Reagan *v.* Mercantile Trust Co., 154 U. S. 413; Reagan *v.* Mercantile Trust Co., 154 U. S. 419; Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 420; Smyth *v.* Ames, 169 U. S. 466, and 171 U. S. 361; Chicago, M. & St. P. R. R. *v.* Tomkins, 176 U. S. 167. See also Smith *v.* Reeves, 178 U. S. 436; 110 Fed. Rep. 3. *Contra*, State *v.* Chicago, R. I. & P. R. Co., 87 N. W. Rep. 188 [Sup. Ct. Neb.]; and s. c. 85 N. W. Rep. 556.

under legislative authority fixing maximum rates for the service of common carriers or other public service corporations. In some of them the federal question presented was twofold; namely, that the statutes or orders in question violated the contract clause of the United States Constitution in respect of the complainant's charter, and also violated the Fourteenth Amendment to the United States Constitution; but in all of them the principal ground of jurisdiction relied on by the complainant, and in most of them the sole ground, was that the statute or order invaded rights secured to him by that provision of the Fourteenth Amendment to the United States Constitution which forbids a state to deprive any person of property without due process of law or to deny to any person within its jurisdiction the equal protection of the laws. In these cases the equity of the bill is stated to be the prevention either of a multiplicity of actions or of other irreparable damage for which the law afforded no adequate remedy, or both.

In the first seven of these cases, while the relief sought was after elaborate consideration denied either upon the merits or for other reasons, the court appears to take for granted [1] that they could not be disposed of as suits against the sovereign, which, as stated by Mr. Justice Miller in discussing the Eleventh Amendment, in United States *v.* Lee,[2] is the ground on which the Supreme Court will of its own motion dismiss any case open to that objection.

The next five cases (Reagan *v.* Farmers' Loan and Trust Co. and Smyth *v.* Ames) contain an elaborate exposition of the reasons why such suits are not obnoxious to the provisions of the Eleventh Amendment, and the relief prayed for was granted in both cases.

In the last case (Chicago, M. & St. P. R. R. *v.* Tomkins) the relief prayed for in the bill was granted without discussion of this point. The silence of the court on the question of federal jurisdiction — always equivalent to an affirmation that such jurisdiction exists [3] — is of special significance in the Tomkins case, as

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[1] See the remarks of Mr. Justice Brewer on this point in Chicago & N. W. R. R. *v.* Dey, 35 Fed. Rep. 866, at 871, 872.

[2] 106 U. S. 196, 215, 216.

[3] As indicated by the rule that the court must of its own motion dismiss a bill for lack of federal jurisdiction, even though the existence of such jurisdiction is assented to by both parties. See Metcalf *v.* Watertown, 128 U. S. 586, 587, where Harlan, J., says that "whether the court had or had not jurisdiction (by reason of a federal question) is a question which we must examine and determine, even if the parties forbear to make it or consent that the case be considered on its merits." See also Desty, Fed. Proc., sect. 84, 9th ed., p. 340, and cases cited.

that decision was subsequent to the discussion of the question in the Reagan and Nebraska cases and in Fitz *v.* McGhee, referred to below.

In Reagan *v.* Farmers' Loan and Trust Co., where the attorney-general and state railroad commissioners were enjoined from enforcing by litigation in the state courts a rate fixed by the commission, Mr. Justice Brewer, speaking for the court, and considering the objection that the suit was against the state of Texas, said :[1] —

"We are unable to yield our assent to this argument. So far from the state being the only real party in interest and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers; and the only direct and pecuniary interest which the state can have arises when it abandons its governmental character, and as an individual employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the state is interested in the question, but only in a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes; and yet a frequent and unquestioned exercise of jurisdiction of courts, state and federal, is in restraining the collection of taxes illegal in whole or in part. Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make its administration an illegal burden and exaction upon the individual."

In Smyth *v.* Ames the attorney-general and state commissioners were enjoined from bringing suits in the state courts to enforce a rate fixed by the legislature. Mr. Justice Harlan, speaking for the court, and considering the objection that the suit was against the state of Nebraska, said :[2] —

"But, to prevent misapprehension, we add that within the meaning of the Eleventh Amendment of the Constitution the suits are not against the state, but against certain individuals charged with the administration of a state enactment which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiff. It is the settled

[1] At p. 390.

[2] At p. 518.

doctrine of this court that a suit against individuals for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff is not a suit against the state within the meaning of that amendment."

Chicago, M. & St. P. R. R. *v.* Tomkins[1] follows, as already noted, the decision in the Reagan and Nebraska cases; and the members of a state commission were enjoined from instituting proceedings in the state courts to enforce the order.

(*c*) The case of Fitz *v.* McGhee.

In the mean time, however, came Fitz *v.* McGhee,[2] which is now often relied upon by state officials as authority for the proposition that suits of this character against them are in reality against their state.

That was a bill in equity in the circuit court by the receivers of a railroad owning a toll bridge against, *inter alios*, the governor, attorney-general, and the county solicitor of the state of Alabama, to enjoin them from instituting criminal prosecutions and civil proceedings in the nature of mandamus or *quo warranto* against the complainants for violation of a statute of Alabama fixing the maximum rate of toll to be charged by the complainants for foot passengers and others using the bridge, and imposing a fine for every violation of this law. The bill alleged that a large number of indictments had been found against the toll-keepers of the bridge by a grand jury of the state, and prayed for an injunction against the further prosecution of said indictments. An examination of the statutes of Alabama shows that there was nothing in the act referring to the governor, the attorney-general, any county attorney, commissioner, or other officer of the state of Alabama, or defining or declaring the persons responsible for the enforcement of the law; and there was nothing in any other law of the state of Alabama, or in the constitution thereof, imposing upon any officer of the state any special duty or discretion with reference to the enforcement of said act, except in so far as the governor and attorney-general were by the very nature of their offices and their official oaths charged generally with the enforcement of all the laws of the state.

The Supreme Court held that this was a suit against the state of Alabama, Mr. Justice Harlan, speaking for the court, saying:[3] —

"It is to be observed that neither the attorney-general of Alabama

[1] 176 U. S. 167. [2] 172 U. S. 516. [3] At p. 529.

nor the solicitor of the eleventh judicial circuit of the state appears to have been charged by law with any special duty in connection with the Act of Feb. 9, 1895. In support of the contention that the present suit is not one against the state, reference was made by counsel to several cases, among which were Poindexter *v.* Greenhow, 114 U. S. 270; Allen *v.* B. & O. R. R., 114 U. S. 311; Pennoyer *v.* McConnaughy, 140 U. S. 1; *In re* Tyler, 149 U. S. 164; Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, 388; Scott *v.* Donald, 165 U. S. 58; and Smyth *v.* Ames, 169 U. S. 466."

"Upon examination it will be found that the defendants in each of those cases were officers of the state specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which it was averred that they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official positions under a state to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If because they were law officers of the state a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney-general based upon the theory that the former as the executive of the state was in a general sense charged with the execution of all its laws, and the latter as attorney-general might represent the state in litigation involving the enforcement of its statutes." [1]

It will be seen that the court appears to distinguish the Reagan and Nebraska cases — the only rate cases cited — on the ground

[1] The last sentence in the quotation from the opinion in Fitz *v.* McGhee seems to have been written in disregard of the fact that an injunction against the enforcement of a state law cannot issue from a federal court unless the bill shows a case within the *equity* jurisdiction of the court. The complainant must set out sufficient reasons for invoking the chancery powers of the court, or his bill will fail, whether brought in a state or federal court. This consideration would dispose of any such wholesale invocation of federal aid as is suggested in the sentence quoted, and, in fact, of most attempts to get into the federal courts without diversity of citizenship. Cases of alleged violations of the contract clause, for instance, seldom present the elements of equity jurisdiction. Rate cases are peculiar in this respect, owing to the multiplicity of suits and the irreparable damage threatened. Compare Shelton *v.* Platt, 139 U. S. 591.

that in the case under consideration the respondents were not specifically charged by the state laws with the enforcement of the statute complained of; and to distinguish the other cases cited on the ground that in them it was alleged that the respondents were about to commit, under color of the state law, some specific wrong or trespass to the injury of the plaintiff.

This line of reasoning may not be wholly satisfactory as a means of reconciling the various decisions on the Eleventh Amendment; but it certainly could not have been the purpose of the court to intimate that every suit to enjoin state officers from the institution of civil proceedings under a state law where no tort or trespass was threatened was a suit against a state, for such a decision would have overruled Reagan *v.* Farmers' Loan and Trust Co., and Smyth *v.* Ames, and would itself have been overruled by Chicago, M. & St. Paul R. R. *v.* Tomkins.

In order to appreciate the nature of the distinction asserted by the court, in Fitz *v.* McGhee, to exist between that case and the Reagan cases and Smyth *v.* Ames, it will be well to examine the statutes brought in question in the two last-named cases as well as the statutes considered in Chicago, M. & St. Paul R. R. *v.* Tomkins.

Taking up the Reagan case first we find, by reference to the Supplement to Sayles' Texas Statutes of 1888–93,[1] that the law of April 3, 1891, provided, in sect. 19, that suits for the penalties imposed by the act should be brought in the name of the State of Texas by the attorney-general, and that by sect. 21 it was made the duty of the railroad commission to "see that the provisions of this act and all laws of this state concerning railroads are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the state therefor recovered and collected; and said commission shall report all such violations with the facts in their possession to the attorney-general, or other officers charged with the enforcement of the laws, and request him to institute the proper proceedings." The provision in reference to suits for penalties was mandatory, but the provision in regard to the general enforcement of the act — as, for instance, by mandamus, *quo warranto,* and other similar remedies — appears to have been discretionary. Nevertheless, the injunction issued in that case against the attorney-general restrained him from instituting any kind of litigation, not only suits for penalties, but also any other form of action or legal proceeding.

[1] P. 773 *et seq.*

In Smyth *v.* Ames, sect. 16 of the Nebraska statute of April 12, 1893,[1] provided that, whenever any common carrier should violate or refuse to obey the act or any lawful order of the board, "it shall be the duty of the board . . . to plead in a summary way by petition filed in the judicial court of the district;" . . . and sect. 19 provided that, "if such railroad shall refuse or neglect to comply with such order, the board shall order the attorney-general of the proper county to institute a suit to compel such railroad company to comply with such order, and it shall be the duty of the attorney-general or the county attorney of the proper county at the request of the board . . . to apply to the supreme court . . . for a writ of mandamus to compel such railroad to comply with said order." These provisions are stronger than the provisions in the Reagan case, since they are all mandatory in form, and define the kind of legal proceeding which shall be instituted.

In Chicago, M. & St. P. R. R. *v.* Tomkins the material provisions of the South Dakota statute of February 3, 1897,[2] are: Sect. 10 provides for the issuing of a writ of mandamus by a state court to compel a railroad to post schedules "at the relation or upon the petition of the state board of railroad commissioners of this state;" sect. 15 authorizes, but does not require the commissioners to apply to certain state courts for a subpœna requiring the production of the books and papers of any railroad; sect. 19 makes it the duty of the commissioners to apply to certain state courts for an injunction to compel obedience to any lawful order of the board, and also provides that, whenever such petition shall be filed or presented or be prosecuted by the state commissioners, "they may require the attorney-general of the state to prosecute the same, and in such prosecution he shall have the right to have the assistance of the state's attorney of any county in which any such proceedings are instituted, and it is hereby made the duty of any state's attorney to render such assistance; or the state commissioners may employ any other attorney . . . to prosecute the same;" sect. 32 requires the commissioners to institute suits against any railroads whom they believe to be guilty of "extortion" for the penalties prescribed by the act; sect. 41 provides that the "attorney-general of the state of South Dakota shall at all times, when requested, give the railroad commissioners such counsel and advice as they may from time to time

[1] Ch. 72, art. 12.

[2] Laws of 1897, ch. 110.

require, and it is hereby made his duty to institute and prosecute, whenever requested by the railroad commissioners, all suits which said railroad commissioners may deem it expedient and proper to institute." Sect. 43 is mandatory upon the attorney-general to institute proceedings for the forfeiture of the franchise of any company guilty of continued violations of the act. It will be seen that the provisions of the statute in this case were partly mandatory and partly merely permissive; but the reason for the omission of the attorney-general as a party respondent was apparently that the bill, being filed the next day after the publication of the schedules of rates complained of, did not (and doubtless could not) allege that the attorney-general was threatening to enforce the schedule by proceedings in the state courts.

In these three cases, one of which was subsequent to Fitz *v.* McGhee, an injunction was granted against the commissioners to prevent their enforcing the order by any kind of proceeding in the state courts; and in two of them the attorney-general was also enjoined from taking any steps to enforce the order.

From this examination of the statutes in question in the Reagan, Smyth, and Tomkins cases it seems clear that it is not the fact that one remedy rather than another is prescribed by the statute, or that the statute makes the adoption of some remedies mandatory, and by implication leaves others to the discretion of whatever officer may seek to enforce the statute, but rather the specific designation of particular officers as the individuals to enforce the statute and the command to them to enforce it that constitutes "special charging" in the sense of Fitz *v.* McGhee, and prevents a suit in equity to restrain such officers from enforcing the statute from being a suit against the state which has specially charged them to enforce it.

Whether the reason for this distinction is sound may with submission be doubted.

Mr. Justice Brewer in his vigorous discussion of the effect of the Eleventh Amendment in the Reagan cases says nothing which can be construed as an allusion to these aspects of the Texas statutes which were before him, — a singular omission if the court in those cases thought that the question of federal jurisdiction depended upon the element of "special charging."

Again in Smyth *v.* Ames, Mr. Justice Harlan himself, speaking for the court and discussing the question as to the effect of the Eleventh Amendment, uses language which seems hardly to suggest either the importance or even the existence of the test of

"special charging." Moreover, the final decree in that case[1] is in the most sweeping terms, and in Smith *v.* Reeves,[2] a decision subsequent to Fitz *v.* McGhee, Mr. Justice Harlan, delivering the opinion of the court and discussing the objection (which was upheld) that the suit was against a state, makes no mention of the doctrine of special charging or of Fitz *v.* McGhee, but reaffirms the doctrine of the Reagan cases and of Smyth *v.* Ames.

Finally, in the Tomkins case, which is the most recent rate case, no reference is made to the matter of "special charging."

It is difficult to understand why in determining the effect of the Eleventh Amendment in suits of this nature it can be material that some or all of the respondents are acting in pursuance of a special rather than a general command of the state, or that the particular form of procedure adopted by them to enforce it is prescribed by the statute itself or selected by them in the exercise of discretion from the appropriate remedies furnished by the general statutes or common law of the state.

Equity jurisdiction is given by the allegations of the bill in reference to the nature of the injury about to be inflicted; federal jurisdiction is given by the allegation that the justification for the threatened acts depends upon the application and construction of the Fourteenth Amendment, with which the bill alleges the state statute or order and the threatened acts of the officials thereunder are in conflict. If the last-mentioned allegation turns out to be untrue, then the federal court, retaining jurisdiction because the bill presents a federal question, nevertheless decides that question in favor of the respondents; that is to say, decides that the law or order which they are seeking to enforce is valid so far as the Fourteenth Amendment is concerned. In that case if the respondents are acting under some general provision of statute or common law, making it their duty to enforce all the laws of the state, then that general mandate includes the valid law in question, and a special statutory mandate, if there were one, would be mere surplusage. But if, on the other hand, the federal court, having taken jurisdiction by reason of the federal question, finds

[1] Printed in full in 171 U. S., pp. 362–364.

[2] 178 U. S. 436. In connection with Smith *v.* Reeves (which was not a rate case) see the similar case of President of Yale College *v.* Sanger, 62 Fed. Rep. 177, where jurisdiction of a suit in equity against the treasurer of Connecticut was taken, and negative relief given by enjoining him from paying the income of a certain fund held by him in his official capacity to any person except the complainant. The Eleventh Amendment is discussed in this case. See also Minneapolis Brewing Co. *v.* McGillivray, 104 Fed. Rep. 258.

that that question must be decided adversely to the respondents, then the provisions, if any, of the statute in question specially charging the respondents with the duty of enforcing its substantive requirements in reality specially charge them to deprive the complainant of its property without due process of law, and are, therefore, as much void as the substantive part of the statute. In such a case to say that unless there are such special statutory provisions the suit is against the state within the meaning of the Eleventh Amendment, is to say in effect that jurisdiction under one portion of the Constitution depends upon the existence of certain statutory provisions which are wholly void under another portion of the Constitution. In other words, if jurisdiction is taken by reason of the presence of such special statutory provisions, then the exercise of the jurisdiction may show that those provisions are wholly void. The statement of the court in Fitz *v.* McGhee that unless the respondents are specially charged with the enforcement of the statute, then if jurisdiction were sustained it would follow that "the constitutionality of every act passed by the legislature could be tested by a suit against the governor and attorney-general based upon the theory that the former as the executive of the state was in a general sense charged with the execution of all its laws, and the latter as attorney-general might represent the state in litigation involving the enforcement of its statutes," seems, as has been already pointed out, to blur the distinction between the two senses in which the term jurisdiction is used in this class of cases, *i. e.*, equity jurisdiction and federal jurisdiction. In the case supposed by the court, *ex hypothesi*, the elements of *equity* jurisdiction would be lacking, and for that reason the suit could not be maintained. Moreover, there seems to have been no reason for making the governor of Alabama a party respondent in Fitz *v.* McGhee; and the bill, it would seem, might have been dismissed as to him and retained against those respondents, if any, who were proved to be threatening to inflict injuries upon the complainant such as a court of equity has jurisdiction to enjoin. It is generally no part of the duty of the governors of American states to act as attorneys for their states in judicial proceedings, and it does not appear that the governor in Fitz *v.* McGhee had done so or was threatening to do so.

Again from the standpoint of policy such a test as that of special charging seems open to objection. The common law offers ample remedies for compelling corporations to obey such statutory requirements as those with which we are dealing, and for punish-

ing them for disobedience. The duties and powers naturally incident to the office of attorney-general of any state are quite sufficient to confer upon the incumbent authority to employ any or all of those remedies on behalf of the state. In reality, therefore, no special charging is at all necessary to accomplish the enforcement of such laws. If it is found that without such special provisions suits in equity in the federal courts will be held to be suits against the state, there will be no reason for retaining such provisions and every reason for omitting them from future rate statutes; and thus no jurisdiction will be left to the federal courts in such cases except the jurisdiction of the supreme court on writ of error to the highest court of the state. This surely is not a desirable result.

If the foregoing criticism of the rule laid down in Fitz *v.* McGhee is deemed sound, it may be added that there is perhaps a way of distinguishing that case on the facts from the Reagan cases, Smyth *v.* Ames, and the Tomkins case. For in Fitz *v.* McGhee the proceedings against which the injunction appears principally to have been sought were criminal proceedings, with which on other grounds courts of equity have generally no jurisdiction to meddle.[1] This is the line of distinction hinted at in the recent case of Haverhill Gas Light Co. *v.* Barker *et al.*,[2] where Lowell, J., says: "Again, in Fitz *v.* McGhee the decree sought enjoined state officers from prosecuting indictments and criminal proceedings; no such proceedings are sought to be enjoined in this case."

V.

An important limitation upon suits of this character is imposed by section 720 of the Revised Statutes of the United States, which provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."[3]

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[1] In re Sawyer, 124 U. S. 200, 104 Fed. Rep. 258, 272.

[2] 109 Fed. Rep. 694. See also Ball *v.* Rutland R. R. Co., 93 Fed. Rep. 513, which can be distinguished on the same ground, and also because the elements of equity jurisdiction seem to have been lacking. Compare Western Union Tel. Co. *v.* Myatt, 98 Fed. Rep. 335, where Fitz *v.* McGhee is discussed.

[3] The elaborate discussion of the effect of this section in the note at the end of the recent case of Garner *v.* Second Nat. Bank, 16 C. C. A. 86, 90, leaves little to be added.

Section 720 is merely declaratory of a rule of comity. It is settled that the section has no application to cases where the bill is filed in the federal court before any suits have been begun in the state courts by the respondents.[1] No question concerning the effect of section 720 was raised in the Reagan cases, Smyth *v.* Ames, or Chicago, etc., R. R. Co. *v.* Tomkins, although in the final decree of the circuit court in the principal Reagan case, affirmed by the Supreme Court, it was ordered, *inter alia*, that "all other individuals, persons, or corporations be and they are hereby perpetually enjoined, restrained, and prohibited from instituting or *prosecuting* any suit or suits against the said railroad company for the recovery of any damages, overcharges, penalty or penalties, under or by virtue of the said act or any of its provisions, or under and by virtue of the said tariffs, orders, or circulars of the said railroad commission of Texas," etc.[2] No shippers or persons threatening to bring private suits for damages, overcharges, or penalties were made parties respondent in that case, and it does not appear whether at the time the bill was filed any such private suits had actually been brought or were pending in any state court. It seems clear that although private persons threatening to bring suits under such a statute may be made respondents, they are not necessary parties. If any such persons have actually begun suits in a state court, then it would seem that they cannot be enjoined from prosecuting the same by a federal court, and should not be made parties to the bill. In such case it will be sufficient to make the state officers over whom the federal court has jurisdiction in equity parties respondent (assuming, of course, that they have not actually begun litigation in a state court to enforce the statute or order) and such private persons as it is desired to enjoin who are threatening to begin but have not actually begun litigation in state courts to enforce the statute for their own benefit. Practically it is generally sufficient to obtain a prompt adjudication of the unconstitutionality of the statute or order in a suit in equity against the state officers charged with its enforcement. Where, as in Cotting *et al. v.* Kansas City Stock Yards Co., *et al.*,[3] the plaintiffs are stockholders, the corporation

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[1] 165 U. S. 443; 169 U. S. 432; 4 C. C. A. 503; 109 Fed. Rep. 3; 59 Fed. Rep. 6, 385; Fed. Cas. No. 8541; ib. No. 4830; 44 Fed. Rep. 663; 7 ib. 45. For the application of this rule in removal cases, see 121 U. S. 634.

[2] 154 U. S. 370.

[3] 82 Fed. Rep. 850; s. c. 79 ib. 679; 82 ib. 839.

itself as well as its officers who have declined to protect its interests by instituting the litigation in its name are of course also made parties defendant.

Since our entire article was put in type, a decision has been rendered by the Supreme Court of the United States (November 25, 1901) in Cotting *et al. v.* Kansas City Stock Yards Co. *et al.*,[1] with an opinion by Mr. Justice Brewer dealing with many of the questions to which we have referred. We can only indicate briefly the respects in which the views we have expressed are confirmed by or inconsistent with Mr. Justice Brewer's opinion.

These were two bills in equity filed in 1897 in the Circuit Court of the United States for the District of Kansas by two stockholders of a Kansas corporation, both citizens of Massachusetts, against said corporation and certain of its officers and the attorney-general of Kansas. The suits were brought in behalf of the plaintiffs and of all other stockholders having a like interest. The main purpose of the suits was to have declared invalid a certain act of the legislature of Kansas approved March 3, 1897, entitled "An Act defining what shall constitute public stock yards, defining the duties of the person or persons operating the same, and regulating all charges thereof, and removing restrictions in the trade of dead animals, and providing penalties for violations of this act." A temporary restraining order was granted and a motion for a preliminary injunction made, pending which the court appointed a special master to take testimony upon all matters bearing upon the preliminary injunction prayed for. After a hearing upon the master's report the motion for an injunction was refused and the restraining order set aside. It was thereupon stipulated that the defendants should forthwith file answers, that replications should be immediately filed, and that there should be a final hearing upon the pleadings, proofs, master's report, and exhibits without further testimony from either party. On October 28, 1897, after argument, the court dismissed the bills of complaint, and afterwards an appeal was taken to the Supreme Court of the United States. The circuit court, however, made an order continuing in force the restraining order upon the filing by the corporation of a bond for $200,000 conditioned for the payment to all parties entitled thereto of all

[1] 79 Fed. Rep. 679; 82 ib. 839, 850.

overcharges for yarding and feeding live stock, in case the Supreme Court should affirm the judgment of the circuit court.

The important findings of the master were that the value of the property used for stock yard purposes at the time to which the bill related was $5,388,003.25; that the gross income realized by the company during the year 1896, which was taken as representing its average gross income, was $1,012,271.22; that the total expenditures of the company for all purposes during the same period amounted to $535,297.14, thus indicating a net income for the year of $476,974.08. The circuit court increased the estimate of net income by adding to the expenditures the sum of $113,584.65, for repairs and construction, thus making the net income $590,558.73. It was found also as a fact that if the rates prescribed by the statute for yarding and feeding stock had been in force during the year 1896 the income of the stock yards company would have been reduced that year $300,651.77, leaving a net income of $289,916.96, which would have yielded a return of $5\frac{3}{10}$ per cent. on the value of the property used for stock yard purposes, and of $4\frac{6}{10}$ per cent. upon the amount of the capital stock.

Section 1 of the statute was as follows: "Any stock yards within this state, into which live stock is received for the purpose of exposing or having the same exposed for sale or feeding, and doing business for a compensation, and which for the preceding twelve months shall have had an average daily receipt of not less than one hundred head of cattle, or three hundred head of hogs, or three hundred head of sheep, are hereby declared to be public stock yards."

The other material provisions of the statute were, a requirement that itemized statements of business done be filed annually with the secretary of state by stock yard companies; that "any person or persons violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for the first offence not more than one hundred dollars; for the second offence not less than one hundred dollars nor more than two hundred dollars; and for the third offence not less than two hundred dollars nor more than five hundred dollars and by imprisonment in the county jail not exceeding six months for each offence; and for each subsequent offence he or they shall be fined in any sum not less than one thousand dollars and by imprisonment in the county jail not less than six months."

Section 8 made it "the duty of the attorney-general to prosecute all violations of the provisions of this act."

We premise that not all of the positions suggested or expressly declared by Mr. Justice Brewer can be regarded as held by a majority of the court. For Justices Harlan, Gray, Brown, Shiras, White, and McKenna expressly put their

"assent to the judgment of reversal — so far as the merits of this case are concerned — upon the ground that the statute of Kansas in question is in violation of the Fourteenth Amendment of the Constitution of the United States, in that it applies only to the Kansas City Stock Yards Company and not to other companies or corporations engaged in like business in Kansas, and thereby denies to that company the equal protection of the laws. Upon the question whether the statute is unconstitutional upon the further ground that, by its necessary operation, it will deprive that company of its property without due process of law, we deem it unnecessary to express an opinion."

First. Taking up the point upon which all the judges agree, this case is undoubtedly the leading as it is the latest authority for the proposition laid down in the earlier part of this article, that arbitrary and capricious discrimination between companies engaged in the same kind of business is as much a denial of the equal protection of the laws in statutes regulating rates and prices as in statutes of the sort under consideration in Yick Wo *v.* Hopkins;[1] and that where it appears that there are several stock yards companies in a state, a statute which in terms applies only to those "which for the preceding twelve months shall have had an average daily receipt of not less than one hundred head of cattle, or three hundred head of hogs, or three hundred head of sheep," establishes an arbitrary and unconstitutional discrimination against the single company to which as a matter of fact it applies.

Second. It is the view of Mr. Justice Brewer that *any* discrimination based upon the amount of business done is, irrespective of what might otherwise be the reasonableness of the rates or of other considerations, arbitrary and unconstitutional. But it is believed to be a fair inference from the opinion of Mr. Justice Harlan, with whom five justices concurred, that a majority of the court is not prepared to go so far as that. The majority appear rather to condemn a discrimination which, while in terms based solely upon the amount of business done, in reality is aimed at a particular company described in general terms. This view is certainly more strictly in harmony with the principles of Yick Wo *v.* Hopkins.

Third. Mr. Justice Brewer announces a distinction between

[1] 118 U. S. 356.

companies engaged in a "strictly" or "distinctively public employment" and those "doing a work in which the public has an interest," and draws certain very important conclusions therefrom. In the first class he puts "common carriage, supply of water, gas," etc., and suggests a further definition of it by the following expressions: "Work of a confessedly public character;" "a public service;" "that which is a proper work for the state;" "cases in which a public service is distinctly intended and rendered;" where "the owner has intentionally devoted his property to the discharge of a public service;" "the work of the state;" where the party is specially privileged to exercise some of "the powers of the state," *e. g.* "eminent domain."

In the second class he mentions grain elevators and stock yards, and cites as illustrative authorities, Munn *v.* Illinois,[1] Budd *v.* New York,[2] Brass *v.* Stoeser,[3] and other cases, and for the purpose of further definition employs the expressions "cases . . . in which without any intent of public service the owners have placed their property in such a position that the public has an interest in its use," or "in such a position that willingly or unwillingly the public has acquired an interest in its use;" where, "in pursuit of merely private gain he has placed his property in such a position that the public has become interested in its use;" "property used solely for purposes of private gain, and which only by virtue of the conditions of its use become such as the public has an interest in;" property not used "in the discharge of a purely public service;" an "individual . . . not doing the work of the state," and who "acquires from the state none of its governmental powers."

We again suggest that it would be unsafe to infer from anything in the report that the foregoing language of Mr. Justice Brewer expresses the opinion of a majority of the court.

We stated in the earlier part of this article [4] that it is difficult if not impossible to express in general terms, at once clear and useful, the distinction between the undertakings which historically have been subject to statutory or common law regulation in respect of rates and prices, and those to which such regulation has more recently been extended. We did, however, attempt a partial classification in which the possession of some governmental powers like eminent domain, referred to by Mr. Justice Brewer, became material. As to whether Mr. Justice Brewer's endeavor to classify

[1] 94 U. S. 113. [2] 143 U. S. 517. [3] 153 U. S. 391.
[4] 15 HARVARD LAW REVIEW 253, 254.

with greater precision than has heretofore been attempted is superior to the method of "judicial inclusion and exclusion," we do not feel called upon to express an opinion.

But the conclusions drawn by Mr. Justice Brewer from the distinction between "strictly public employments" and those in which property has been devoted "to a use in which the public has an interest" are of far-reaching importance. After an elaborate review of the decisions of the Supreme Court, he says, referring to undertakings of the second class (not "strictly public"), "What shall be the test of reasonableness in those charges is absolutely undisclosed;" and the conclusion of his reasoning is that "the same rule as to the limit of judicial interference" does not apply in the two classes of cases; that while in the first class of cases "the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered," and also "the value of the services rendered to each individual;"[1] the principal question in the second class of cases is "whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction;" in other words, that in the second class of cases "the question is always not what does he make as the aggregate of his profits, but what is the value of the services which he renders to the one seeking and receiving such services;" and that in determining this value the customary charges of others for the same services furnish an important if not a controlling test. For this he relies principally upon Canada Southern Railway Co. *v.* International Bridge Co.[2] Consequently he holds that the finding of fact of the Circuit Court[3] that the charges made by the Kansas City Stock Yards Co. were no greater (and, in many instances, less) than those of any other stock yards in the country, should have been regarded as decisive in favor of the plaintiffs, and that its effect could not in any wise be modified by the result of the principal investigation, namely, that the statutory rates would permit the company to earn a net profit of "5.3 per cent. on the value of the property used for stock yard purposes, as fixed by the master." In other words, the circuit court "proceeded upon lines which . . . were too narrow," and mistook the comparative significance of its findings of fact.

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[1] Mr. Justice Brewer throws out the suggestion that it ought to be constitutional in this class of cases to fix rates so low as to leave practically no profit at all.

[2] 8 App. Cas. 723, 731.

[3] 82 Fed. Rep. 850.

It cannot safely be asserted that these conclusions of Mr. Justice Brewer represent the views of a majority of the court. The further point made by Mr. Justice Brewer, that if the statute is construed as contemplating a separate offence with a separate penalty for each excessive charge *per head*, as distinguished from the entire number of stock received in one shipment, the enormous aggregate of the penalties would amount to a practical intimidation of the company from asserting its constitutional rights and thus to a denial of the equal protection of the laws, is not stated by him as a ground of the decision, and may therefore be regarded merely as an interesting suggestion.

In reference to them we desire to make only these suggestions.

First. With the exception of certain remarks of Mr. Justice Bradley relating to wharfage charges in Transportation Co. *v.* Parkersburg,[1] referred to by Mr. Justice Brewer, in which, however, no question under the Fourteenth Amendment was before the court, the only references to the value of the services to the recipient in the opinions of the Supreme Court are such as to convey the impression that that consideration may justify in some cases a *lower* legislative rate than is sufficient to yield a fair return upon the *original investment or cost* of the plant.[2] So far, therefore, as the Fourteenth Amendment and the decisions of the Supreme Court thereunder are concerned, it is an entirely new step to hold that the real value of the services to the recipient may render unconstitutional, *i. e.*, unreasonably low, a legislative rate which, while permitting what would otherwise be considered a fair net profit on the actual present value of the property in the use of which the public has an interest, simply takes away the excess which the party has been able to obtain over and above such fair profit by virtue of his superiority to his competitors in point of organizing ability, amount of capital invested, volume of business, etc.

Second. It does not follow that because this step is novel it ought not to be taken. Apparently, without reversing or seriously modifying prior decisions, it cannot be taken with reference to railroads and water companies. Apparently it may be taken with reference to stock yard companies and other enterprises which cannot now be included within any precise general definition.

The order of the Supreme Court was "that the decree of the circuit court be reversed, and the case remanded to that court,

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[1] 107 U. S. 691, 699.

[2] See particularly the remarks of Mr. Justice Harlan in San Diego Land Co. *v.* National City, 174 U. S. 739, 757, quoted by Mr. Justice Brewer.

with instructions to enter a decree in favor of the plaintiffs and against the corporation and its officers, in accordance with the prayer of the bills, and also a decree dismissing the suit as to the attorney-general of Kansas, without prejudice to any further suit or action."

The form of the last part of this order and the reasons therefor as stated by the court are such that no new light is thrown upon the question of jurisdiction under the Eleventh Amendment.

N. Matthews, Jr.
W. G. Thompson.

BOSTON, December 3, 1901.